KKP

v.

PCSP

HIGH COURT MALAYA, KUALA LUMPUR
NORAINI ABDUL RAHMAN J
[ORIGINATING SUMMONS NO: 24-49-02-2013]
11 DECEMBER 2013

CIVIL PROCEDURE: *Jurisdiction - Divorce proceedings - Jurisdiction of High Court to hear petition - Country where marriage was registered in - Whether domicile proven to be in Malaysia - Whether wife acquired and retained domicile of husband - Law Reform (Marriage and Divorce) Act 1976, s. 48*

FAMILY LAW: *Divorce - Jurisdiction - Domicile - Whether domicile proven to be in Malaysia - Whether wife acquired and retained domicile of husband - Law Reform (Marriage and Divorce) Act 1976, s. 48*

FAMILY LAW: *Divorce - Jurisdiction - Forum non conveniens - Divorce proceedings instituted by wife in England - Whether husband's subsequent divorce proceedings filed in Malaysia to be stayed - Determining forum conveniens - Meaning of forum non conveniens - Burden of proof - Whether Malaysia had most real and substantial connection to divorce proceedings*

FAMILY LAW: *Divorce - Stay of proceedings - Forum non conveniens - Divorce proceedings instituted by wife in England - Whether husband's subsequent divorce proceedings filed in Malaysia to be stayed - Determining forum conveniens - Meaning of forum non conveniens - Burden of proof - Whether Malaysia had most real and substantial connection to divorce proceedings - Whether application for stay ought to be allowed*

The plaintiff husband ('PH') and defendant wife ('DW') were born in Malaysia. Their marriage was solemnised in Ipoh, Perak in 1970. Their five children were all over 18 years of age. In 1982, PH, DW and the children moved to Perth for their children's education and security reasons. PH remained residing in Malaysia and travelled between Perth and Malaysia. In or around 1989/1990, PH moved DW and the children to Canada to continue their education there. PH continued residing in Malaysia, as the

centre of his business remained in Malaysia, but would travel between Malaysia and Canada to see DW and their children. DW and the children would occasionally visit Malaysia. Since 1997, PH travelled frequently to England for business and DW often accompanied him on such travels. A property was purchased in England for PH and DW to reside in during the frequent business trips to England. Since 1993 or so, PH and DW had on several occasions sought marriage counselling from their pastors in their churches. DW held dual Australian and Canadian citizenship and had been living in England since October 2012. On 14 February 2013, DW filed a petition for divorce in England. PH applied to the Malaysian High Court for leave to petition for a divorce under s. 53 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') without first having to refer the matrimonial difficulty to a conciliatory body under s. 106(1) of the Act. DW applied for all proceedings herein be stayed pending the hearing and disposal of the petition for divorce at the High Court in England on the grounds that the question of domicile was being determined in the English proceedings and as such it was appropriate for the Malaysian proceedings to be stayed.

Held (dismissing DW's application with costs; allowing PH's application with no order as to costs):

(1) Under s. 48(1) of the Act, a Malaysian court has jurisdiction to make a decree of divorce where the marriage has been registered under the Act. There was no dispute as to the marriage being registered in Malaysia. (para 25)

(2) A divorce can also be granted where the domicile of the parties to the marriage at the time the petition is presented is in Malaysia. The decision of the Court of Appeal in *Neduncheliyan Balasubramaniam v. Kohila Shanmugam* is still the law of the land. Therefore, on the issue of domicile too, the court had jurisdiction to hear the case. (para 25)

(3) The fundamental principle applicable is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice. The word '*conveniens*' in *forum non conveniens* means suitability or

appropriateness of the relevant jurisdiction and not one of convenience. The burden of proof was on DW to satisfy the court that the other forum was more appropriate than the Malaysian forum. The court would also have to consider whether it would be unjust to the plaintiff to confine him to remedies elsewhere and which forum with which the action has the most real and substantial connection. (para 46)

(4) The events, chronology and facts of the case pointed irrefutably to Malaysia as where the action had the most real and substantial connection especially in seeking financial provisions in respect of maintenance and property division where DW had to look to Malaysia where the bulk of PH's assets, business interests, and bank accounts were situated. The main issues in the divorce proceedings between the parties would primarily centre around the issues of maintenance and property division and the witnesses required to testify at the trial were in Malaysia. Further, the documents that will eventually be required to be produced at the divorce trial were kept and stored in Malaysia, especially the financial and company documents. (paras 67 & 68)

(5) Under the LRA, it is a mandatory requirement for parties to refer their matrimonial difficulties to a conciliatory body provided that this requirement shall not apply if the court amongst others is satisfied that there are exceptional circumstances which make such reference impracticable. The parties had sought counselling to resolve their matrimonial problem. Many attempts for reconciliation were made but failed because the very next day after the last attempt, DW filed her divorce petition in the English courts. From her actions, it is doubtful whether DW would return to Malaysia to attend the conciliatory process. Hence, for both parties to attend the conciliation process in Malaysia would be an exercise in futility. Further, the evidence showed determination by DW to go ahead with the divorce irrespective of the process of reconciliation. (paras 79, 81, 83 & 86)

Case(s) referred to:

American Express Bank Ltd v. Mohamad Toufic Al-Ozeir & Anor [1995] 1 CLJ 273 SC ***(refd)***

C v. A [1998] 4 CLJ 38 HC ***(refd)***

De Dampierre v. De Dampierre [1988] 1 AC 92 ***(refd)***

Harris Mohd Salleh v. The Returning Officer, Ismail Majin & Ors (And Another Petition) [2001] 3 CLJ 161 HC ***(refd)***

Neduncheliyan Balasubramaniam v. Kohila Shanmugam [1997] 4 CLJ 676 CA ***(refd)***

R Griggs Group Ltd & Others v. Evans and Others [2005] Ch 153 ***(refd)***

Siah Teong Woei v. Janet Traynor [2010] 3 CLJ 361 HC ***(dist)***

Spiliada Maritime Corporation v. Cansulex Ltd [1987] 1 AC 460 ***(refd)***

Teo Ka Fook v. Loo Chiat Hui [2011] 1 CLJ 247 HC ***(foll)***

Legislation referred to:

Federal Constitution, arts. 23, 24

Law Reform (Marriage and Divorce) Act 1976, ss. 3(1), (2), 48(1)(c), 53, 106(1)

For the plaintiff - YN Foo (Kiran Dhaliwal & Sharon Tee with him); M/s YN Foo & Partners

For the defendant - Malik Imtiaz (SK Shanmuga & Jenie Gill with him); M/s Kanesalingam & Co

Reported by Amutha Suppayah

JUDGMENT

Noraini Abdul Rahman J:

[1] There are two applications before me in the proceeding held on 8 November 2013. The first is the application by KKP the plaintiff husband (PH) for the following reliefs:

(i) That the plaintiff be exempted from the requirement for reference to a conciliatory body under s. 106(1) of the Law Reform (Marriage and Divorce) Act 1976 (the "Act");

(ii) That the plaintiff be at liberty to petition for a divorce under s. 53 of the Act without first having to refer the matrimonial difficulty to a conciliatory body;

(iii) That the costs of this application be borne by the plaintiff; and

(iv) Such further and other relief as this Honourable Court deems fit and proper to be granted.

[2] In short, the PH's originating summons dated 27 February 2013 (encl. 1) is to apply to this court for exemption from referring the matrimonial difficulties of both parties to a conciliatory body under s. 106 of the Law Reform (Marriage and Divorce) Act 1976 (Act 164).

[3] PCSP, the defendant wife (DW), then by notice of application dated 3 May 2013 (encl. 6) apply for the following:

(i) All proceedings herein be stayed pending the hearing and disposal of petition for divorce case no. FD13D00747 by the High Court of Justice (Family Division) of England;

(ii) The costs of this application be borne by the plaintiff;

and/or for such further or other orders as may be considered just by this Honourable Court.

[4] The grounds of the DW's application are that in view of the proceedings in the High Court of Justice (Family Division) of England, in which *inter alia* the question of whether the respondent is domiciled in England is being determined, it would be appropriate for this court to stay proceedings in Malaysia.

[5] As the above application (encl. 6) involve question of jurisdiction, this court will deal with encl. 6 first and then proceed with encl. 1.

[6] I heard oral submissions by their respective counsels based on their written submission.

Encl. 6 – Application By DW For Stay Of Proceedings In Malaysian Court

Brief Relevant Facts

[7] Both the plaintiff husband (PH) and defendant wife (DW) herein were born in Malaysia. Their marriage was solemnised in Malaysia at St. Michael's Church, Brewster Road, Ipoh, Perak, Malaysia on 5 December 1970. There are five children of the marriage, three of whom were born in Malaysia and the younger two, born in Perth, Australia all of whom are over 18 years of age:

(i) A son, Alfred born in Malaysia on 3 August 1971 (aged 42);

(ii) A son, Andrew born in Malaysia on 25 September 1972 (aged 41);

(iii) A daughter, Angelina born in Malaysia on 12 December 1980 (aged 32);

(iv) A daughter, Angeline born in Perth, Australia on 10 May 1983 (aged 30);

(v) A son, Alexander born in Perth, Australia on 15 August 1986 (aged 27).

[8] The PH and DW and the three eldest children moved to Perth, Australia in 1982 for their children's education and security reasons, fearing kidnapping. The PH remained residing in Malaysia and travelled between Perth and Malaysia. The children returned frequently to the matrimonial home in Malaysia. Two of the children were born in Australia.

[9] In or around 1989/1990, the PH moved the children to Canada to continue their education there and the DW again accompanied the children. According to PH's counsel's submission, he continued residing in Malaysia, as the centre of his business remained here in Malaysia, but would travel between Malaysia and Canada to see the DW and their children. Though the DW and the children's trips back were less frequent due to the distance, nevertheless whenever they returned to Malaysia they would live at the matrimonial home.

[10] From 1993 or so, the PH and DW sought marriage counselling from a senior pastor in their local church in Malaysia.

[11] In 1997, Malayan United Industries Berhad ('MUI'), the Malaysian company in which the PH has majority interests, acquired a substantial interest in Laura Ashley PLC, resulting in the PH having to travel regularly to England for business meetings as its Chairman. The DW often accompanied the PH on such travels to the UK.

[12] In 2000 through a company in which the PH had interests, a property known as Rossway Park was purchased in Hertfordshire, England, as an investment and for the PH to reside in, during his frequent business trips to England. The DW was delighted and described Rossway Park as follows:

> The estate is 1,000 acres with a 20,000 square feet 10 bedroom house in which each of our children have their own room, another 5 bedroom house, a number of satellite properties, land, and a menagerie of exotic animals such as llamas ...

[13] In 2003 or so, the PH and DW sought marriage counselling from senior pastor in their church in Canada. On 12 December 2008, the PH suffered a stroke. The DW returned to Kuala Lumpur on 15 December 2008.

[14] In 2009 or so, the PH and the DW again sought marriage counselling from a senior pastor in their church in Singapore. In 2009, they were again trying to work at the marriage.

[15] From 2011 or so, the PH and DW tried to resolve their marital difficulties with the help of a mutual friend, one Ms Kwa Kim Li ('Ms Kwa').

[16] According to PH's affidavit between January and September 2012, the DW accompanied the PH on at least ten personal and work related trips from Kuala Lumpur to the following destinations:

(a) Singapore (three trips);

(b) Argentina;

(c) Brunei and Miri;

(d) Venice (two trips);

(e) Hong Kong (numerous);

(f) Perth (two trips);

(g) Kota Kinabalu; and

(h) London (four or more trips).

[17] On or about 6 October 2012, DW travelled to England with the PH but remained behind. PH left England a week later.

[18] It is not in dispute that the DW holds dual Australian and Canadian citizenship. It is not in dispute that the wife has been living in England since October 2012.

[19] On 14 February 2013, the DW filed a petition for divorce in England.

[20] The DW also obtained an occupation order prohibiting the PH from entering the matrimonial home in England and a non-molestation order against the PH. These orders were extended on

an *inter partes* hearing: and have been further extended by agreement to 17 October 2014 or further order of the court by way of a consent order agreed on 14 October 2013.

[21] The English petition was first served on the PH on 18 February 2013.

[22] Some nine days later on 27 February 2013 the PH filed encl. 1, in Malaysia.

[23] On 3 May 2013, the DW filed a notice of application (encl. 6) to stay all proceedings in Malaysia pending the hearing and disposal of her petition for divorce case no: FD13D00747 by the High Court of Justice (Family Division) of England.

The Law

[24] Section 48(1) of the Law Reform (Marriage and Divorce) Act 1976 (LRA) provides:

> 48. Extent of power to grant relief
>
> (1) Nothing in this Act shall authorise the Court to make any decree of divorce except:
>
> (a) where the marriage has been registered or deemed to be registered under this Act; or
>
> (b) where the marriage between the parties was contracted under a law providing that, or in contemplation of which, marriage is monogamous; and
>
> (c) where the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia.

[25] Therefore, under s. 48(1) of the LRA, a Malaysia Court has jurisdiction to make a decree of divorce if the following conditions are satisfied ie, where the marriage has been registered under the LRA. It is to be noted that there is no dispute as to the marriage being registered in Malaysia. Secondly, there is another condition that a divorce can be granted where the domicile of the parties to the marriage at the time the petition is presented is in Malaysia.

[26] The key word in this s. 48(1)(c) is domicile. Counsel for the PH submitted that parties are domiciled in Malaysia. Miss Foo submitted that the PH and DW were both born in Malaysia. Accordingly by law, their domicile of origin is Malaysia. She further

submitted that the parties domicile is Malaysia is further enhanced by the statutory presumption that a Malaysia citizen is deemed domiciled in Malaysia under s. 3(2) of the LRA. For purpose of clarity, ss. 3(1) and (2) of the LRA is reproduced below:

> 3. Application
>
> (1) Except as is otherwise expressly provided this Act shall apply to all persons in Malaysia and to all persons domiciled in Malaysia but are resident outside Malaysia.
>
> (2) For the purposes of this Act, a person who is a citizen of Malaysia shall be deemed, until the contrary is proved, to be domiciled in Malaysia.

[27] According to her submission, the PH was born in Johore, is a Malaysian citizen and is domiciled in Malaysia and so is the DW who herself was born in Perak, Malaysia and continues to be a Malaysian citizen because she still carry a Malaysian National Registration identity card. However, in his submission, counsel for the DW Mr Malik Imtiaz and later Mr K Shanmugam submitted that the fact that a person carries an NRIC does not mean that he is a Malaysian citizen. He cited the case of *Harris Mohd Salleh v. The Returning Officer, Ismail Majin & Ors (And Another Petition)* [2001] 3 CLJ 161; [2001] 3 MLJ 433 where at p. 450 Muhammad Kamil J, said that "the identity card is not proof of citizenship". So, it does not equate NRIC with citizenship. On this, the argument by Miss Foo is not sustainable.

[28] At this juncture, it is proper for the court to mention about the convention on the elimination of all forms of discrimination against women (CEDAW) which Malaysia ratified in 1996. The DW's counsel submitted that with CEDAW the submission by the PH that a wife acquires the domicile of her husband and cannot abandon such domicile and acquire her own independent domicile is outdated and is no longer good law. He cited art. 15(4) of CEDAW. Article 15(4) is reproduced as follows:

> States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

[29] Miss Foo replied saying that in so far as domicile of the wife is concerned the law has not changed even though Malaysia ratified CEDAW. She said that CEDAW was ratified in 1996 but in 1997, a Malaysian case of *Neduncheliyan Balasubramaniam v.*

Kohila Shanmugam [1997] 4 CLJ 676; [1997] 3 MLJ 768 was heard by the Court of Appeal. His Lordship Mahadev Shanker JCA delivering the judgment of the court said that "... we are of the opinion a Malaysian women upon marriage will acquire her husband's domicile and until that marriage was lawfully dissolved, she will retain the domicile of her husband." Therefore, she submitted that DW is still domiciled in Malaysia. Miss Foo also cited the "*Combined initial and second periodic reports of State Parties – Malaysia dated 12 April 2004*". In that report it states:

> Domicile Matters
>
> The principles on domicile in Malaysia come from the common law of England. Under Section 3(1) of the Civil Law Act 1956 (Act 67), it is stated that in the absence of any applicable law in Malaysia the common law and the rules of equity as administered in England shall be applicable subject to the local customs and beliefs. Under this section, the Court shall in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered or in force in England on the 7th day of April 1956 ...
>
> Matrimonial domicile is applicable to a married woman and the children of such marriage. Following English case law, in Malaysia, a married woman acquires the domicile of her husband upon marriage to him.

[30] Although this was not submitted by either counsel, I am reproducing part 1, art. 2(b) and (f) of CEDAW as follows:

> Article 2
>
> States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:
>
> (a) ...
>
> (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
>
> (c) ...
>
> (d) ...
>
> (e) ...

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

[31] I have perused the LRA and I cannot find any provision which was amended to comply with the above. As such, the decision of the Court of Appeal in *Neduncheliyan Balasubramaniam v. Kohila Shanmugam* [1997] 4 CLJ 676; [1997] 3 MLJ 768 is still the law of the land.

[32] To fortify her argument that the DW is still domiciled in Malaysia, Miss Foo cited the case of *Charnley v. Chanley and Betty* [1959] 1 LNS 12; [1960] MLJ 29 where Rigby J said:

> But before this Court could grant the petition it required to be satisfied that it had jurisdiction to do so. The domicile of a married woman is that of her husband while the marriage subsists, even though the parties may be living apart.

[33] Therefore, on the issue of domicile, this court has jurisdiction to hear the case.

Principle Of Comity As Between Malaysian Court And The English Court

[34] Counsel for the DW in his written submission for the stay application said that the only question that requires consideration is whether having regard to all circumstances, this court (Malaysian Court) ought to give the English High Court an opportunity to determine whether it has jurisdiction. Amongst the reasons given was the DW's position that she is not submitting to the Malaysian jurisdiction because she currently is holding two foreign passports ie, the Canadian and Australian passports. Also, she did not apply for the NRIC card and she did not know how one NRIC card was issued to her. I have already dealt with the issue of the NRIC above. There is no need for me to repeat. Counsel for the DW cited the principle of comity in the case of *R Griggs Group Ltd & Others v. Evans and Others* [2005] Ch 153 as follows:

> Now, "comity is a term of very elastic content": see Dicey & Morris, *The Conflict of Laws*, 13th. ed (2000), vol 1, para 1-010, p. 5. In general, however, when our Courts say that they intend to refrain from making a particular order because it would be a breach of international comity, they mean that, in their judgment, a foreign Court would reasonably construe it as an invasion of the sovereignty of its country, and to resent it accordingly. We

A do not mean to offend foreign Courts, as by seeming to undermine their jurisdiction and authority, and expect a similar degree of self-imposed judicial restraint on their side.

[35] Counsel for DW submitted the comity principle is as such engaged where proceedings in respect of the same dispute are B commenced in two territories, the courts of each arguably having the jurisdiction to determine the dispute (though this is not conceded in the case at hand where the Malaysian Courts are concerned). The English approach has been to allow for the foreign court to consider staying the proceedings in that court, C prior to considering whether an anti-suit injunction ought be granted.

[36] Counsel for the DW cited two cases in support of his arguments. Firstly he cited the decision by the High Court in the D case of *Siah Teong Woei v. Janet Traynor* [2010] 3 CLJ 361 where Suraya Othman J, citing Lord Pearson said:

> It seems to me that, subject to appropriate limitations, a divorce granted in another country on the basis of nationality or on the E basis of domicile (whether according to English case-law or according to a less exacting definition) should be recognized as valid in England. Also if the law of the other country concerned enables a wife living apart from her husband to retain or acquire a separate qualification of nationality or domicile for the purpose of suing for divorce, and the jurisdiction has been exercised on F the basis of that qualification, that would not, normally at any rate, be a reason for refusing recognition.

[37] Further in her judgment, Suraya Othman J said:

> This Court is of the opinion that Malaysian Court should apply G the abovementioned English principles as the basis for recognition of a foreign decree of divorce. This is because there should be reciprocity of treatment so that recognition should be given to a divorce obtained in the exercise of a jurisdiction substantially similar to that exercised by the Malaysian Court. In other words, H the basis for recognition of the decree *nisi* granted by the English High Court is due to the fact that the provision which the respondent wife used to get the decree *nisi* is in substance similar or "*pari materia*" to our s. 49(1)(b) of the LRA 1976 and therefore it would be contrary to principle and inconsistent with comity if the Malaysian Courts were to refuse to recognize a I jurisdiction which, *mutatis mutandis*, they claim for themselves.

[38] The judgment speak of the recognition of a foreign decree *nisi* and that Malaysian Court "because there should be reciprocity of treatment so that recognition should be given to a divorce obtained in the exercise of a jurisdiction substantially similar to that exercised by the Malaysian Court". It is important to distinguish between that case and our case. In our case, the English Court has yet to hear applications made by DW let alone giving a decision on the divorce.

[39] The second case cited by the DW's counsel was the case of *Teo Ka Fook v. Loo Chiat Hui* [2011] 1 CLJ 247 in connection with a divorce proceeding in Australia.

[40] Rhodzariah Bujang JC (as she then was) said the following:

> Recognition of a foreign judgment is part of the larger doctrine of comity of nations. It has been said in *Anthinarayana Mudaliar v. Ajit Singh* [1953] 1 LNS 2 that such a judgment or decree will be treated and acted upon by the Malaysian Courts as final, notwithstanding any irregularity of procedure and the local law so long as the foreign court had jurisdiction over the subject matter and the person brought before it and the proceedings do not offend against natural justice. Despite the passage of time, this principle to my knowledge, is applicable even today. YA Datuk Suraya Othman in *Siah Teong Woei v. Janet Traynor* [2010] 3 CLJ 361 had decided that a decree nisi granted by the High Court of England is to be recognized here since the English Courts exercise a jurisdiction similar to that of the Malaysian Courts. Her Ladyship referred to and followed the English case of *Travers v. Holley and Holley* [1953] 2 All ER 794 in which the English Courts recognized a decree of divorce granted by the Australian Court of New South Wales on the principle that recognition is given for a jurisdiction which the Court themselves claimed.

[41] Her Ladyship quoted and applied in her decision, that part of the judgment of the English Court in which Hodson LJ held:

> ... it would be contrary to principle and inconsistent with comity if the Courts of this country were to refuse to recognize a jurisdiction which *mutatis mutandis* they claim for themselves. The principle laid down and followed since *Le Mesurier v. Le Mesurier* [1985] AC 528 must be interpreted in the light of the legislation which has extended the power of the Courts of this country in the case of persons not domiciled here.

[42] I am in full agreement with Her Ladyship and in a circuitous way based on the case authorities cited above, the certificate of divorce by the Family Court of Western Australia issued to the wife respondent in this case must also be recognised by me.

[43] For the reasons stated above, the petition filed herein is struck off with an agreed cost of RM3,000.

[44] Again, it is noted that the recognition was for a decree of decree *nisi* obtained in a foreign country.

[45] So the two cases cited by the counsel for the DW did not help this court to apply the principle of comity in our case. They were cases where divorce were already granted.

Forum Non Conveniens

The Law On Forum Non Conveniens In Malaysia

[46] Miss YN Foo, for the PH submitted that the leading authority on the principles applicable in stay applications on the basis of *forum non conveniens* in Malaysia is the Supreme Court decision in *American Express Bank Ltd v. Mohamad Toufic Al-Ozeir & Anor* [1995] 1 CLJ 273; [1995] 1 MLJ 160 ("*The American Express* case") where His Lordship, Peh Swee Chin FCJ endorsed the House of Lords decision in *Spiliada Maritime Corporation v. Cansulex Ltd* [1987] 1 AC 460 and adopted the following principles:

(1) That the fundamental principle applicable is that a stay will only be granted on the ground of *forum non conveniens* where the Court is satisfied that "there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice".

(2) That the word "*conveniens*" in *forum non conveniens* means suitability or appropriateness of the relevant jurisdiction and not one of convenience. Citing Lord Goff, Peh Swee Chin FCJ said:

> Lord Goff cautioned that the word '*conveniens*' in *forum non conveniens* meant suitability or appropriateness of the relevant jurisdiction and not one of convenience.

(3) That the burden of proof is on the DW to satisfy the Court the other forum is more appropriate than the Malaysian forum. Citing Lord Templeman, His Lordship Peh Swee Chin said: A

> In our view, where an application by a defendant for stay of proceedings is concerned, in applying the said doctrine, the defendant would have to satisfy the Court that 'some other forum is more appropriate' per Lord Templeman in *The Spilliada*. B

[47] Further, our Supreme Court singled out the following two considerations for special mention and emphasis: C

(a) Whether it would be unjust to the plaintiff to confine him to remedies elsewhere:

> It will be obligatory for a Malaysian Court to consider in any event, a most important factor, ie, whether 'it would be unjust to the Plaintiff to confine him to remedies elsewhere'. It is indispensable when a Malaysian Court considers all cases in connection with *forum non conveniens*. D

(b) Which is the forum with which the action has the most real and substantial connection: E

> The most important factor described above does arise, of course, out of a great variety of factors that a Malaysian Court ought to consider in applying the said doctrine; the prominent one being that whether any particular forum is one with which the action has the most real and substantial connection. F

[48] Counsel for the PH also submitted the following:

Applying the aforesaid principles set out by our Supreme Court in the *American Express* case, on the facts of our present case we say: G

(i) Malaysia is the forum with which the present action has the most real and substantial connection; H

(ii) It is the more appropriate forum to try the case for the interests of all the parties and for the ends of justice; and

(iii) It would be unjust to the PH herein to confine him to remedies elsewhere, namely England. I

A ***Spiliada*** *Principles Applicable To Matrimonial Disputes*

[49] Counsel for the PH also referred to the case of *De Dampierre v. De Dampierre* [1988] 1 AC 92 where the House of Lords held:

B (i) the *Spilliada* test and its approach applied equally between husband and wife in a matrimonial dispute;

(ii) on the facts in *De Dampierre v. De Dampierre* the French wife "cannot sever her direct French connections derived from ancestry, birth, nationality, education, culture and marriage C laws, or her indirect French connections through her husband and child".

[50] To quote Lord Templeman:

> D On the one hand it is logical and not unfair to the Wife to treat her as a French wife entitled to the rights conferred by French law on divorced wives. On the other hand it would be unfair to the husband to treat the wife as if she were an English wife entitled to the rights conferred by English law on divorce wives when, in truth, the wife is a French wife, resides at present in E the United States and has no connection with England.

[51] The juridical advantage to the wife was held not to be a decisive factor. Miss YN Foo further submitted the following:

> – on the facts of that case, notwithstanding that the French Wife F would be disadvantaged in that she might no be able to claim maintenance for herself in the French Court, nevertheless the House of Lords granted the stay of the English proceedings sought by the Husband on the basis that there were very strong factors connecting the case to France.

G **[52]** And so based on the above submission, Miss YN Foo submitted that Lord Templemen's approach should be applied to the facts of our case. The DW herein is a Malaysian wife with roots in Malaysia, having resided in Australia, Canada and Malaysia, with tenuous connections to England. It would, as Lord H Templemen puts it, be logical and not unfair to treat her as a Malaysian wife entitled to the rights conferred to her by Malaysian law. On the other hand, it would be unfair to the PH to treat the wife as an English wife entitled to the rights conferred by English law.

I

[53] I have considered the submission above and I agree that it would be logical and not unfair to treat DW as a Malaysian wife entitled to the rights conferred to her by Malaysian law.

The Relevant Facts: Substantial Connection To Malaysia

[54] It is important at this point to determine the issues that may be in dispute in Malaysian proceedings in order to determine which is the more appropriate forum.

> It is clear as both the PH and the DW have initiated proceedings, they clearly want to be divorced from each other. There is therefore no dispute about the inevitability of a divorce.
>
> There is no issue of custody, as there are no minor children.
>
> In this divorce, the main issues for determination would be the financial issues of maintenance and property division.

[55] In this regard the following factors point overwhelmingly in favour of Malaysia as the country with which the action has the most real and substantial connection and hence the more appropriate and natural forum for the trial of the action.

> Both the PH and the DW are Malaysian citizens born and domiciled in Malaysia. The plaintiff husband remains living in Malaysia, travelling on a Malaysian passport. He has no right of permanent residence or citizenship of any other country.
>
> The parties both grew up and lived in Malaysia into their adult life. All the PH's surviving siblings, and extended family remain residing in Malaysia. So too the DW's siblings and extended family, save for a brother who lives in Vancouver, Canada and a nephew who lives in England.
>
> The DW has no right to remain in England as of right, and only remains in England on a tourist visa. She is neither a Permanent Resident nor does she have a work permit to remain in England.

[56] The DW does not deny this. In fact by her own admission; she said:

> I currently travel on my Australian passport, but I am trying to obtain permanent leave to remain in the UK and a UK passport as soon as I can. I have enlisted specialist immigration counsel to

> achieve this. I understand that an investment visa (which was not seriously available to me as I had very little in my home and certainly not enough to obtain a visa) is the best option available to me. As I say, I have already obtained immigration law advice on the procedure.

[57] The parties were married in Malaysia and their first three children were born here. The parties have been attending church in Malaysia throughout their marriage, and had even sought counselling with, Tan Sri Gunaratnam of Calvary Church.

[58] Miss YN Foo submitted that the matrimonial home, ie, No. 10, Ukay Heights, Ampang is in Malaysia. The PH continues to reside in the home. Until 6 October 2012 ie, the date when the DW chose to remain in England to set into motion her filing divorce proceedings in England, the DW too had lived in the matrimonial home at Ukay Heights. The PH has stated:

> In the lead up to 6.10.2012, from the way the Defendant Wife went about her daily life when in Malaysia it is clear that she had no intention to stay in England and was treating our matrimonial home very much like the home that it has been for us for our entire marriage. In fact, as late as August 2012, the Defendant was still coordinating minor renovation works for our matrimonial home.

[59] Between December 2011 and September 2012 (just prior to her remaining in England), from the DW's various emails to the PH's staff in Kuala Lumpur, she was very much living in the matrimonial home at Ukay Heights, running the household and coordinating minor renovation works. The emails detail the following:

- An email of 4/12/2011 when she directs one of the husband's private secretaries, Nishatul Delina binti Desa ("Delina"), to give specific instructions to their housekeeper on how to make her organic vegetable soup and purchase organic fruit and vegetables, insisting on receipts being produced;
- Another email dated 12 April 2012 giving Delina various instructions including about work to be done for the matrimonial home;
- A series of emails at the end of June 2012 with various instructions for the husband's members of staff;

- An e-mail dated 12 July 2012 to Pauline Lee, another one of the husband's private secretaries, about the pool salt water system for their matrimonial home;

- An e-mail dated 8 August 2012 to Pauline Lee about lunch order as well as an earlier email for the sauna to be moved in their matrimonial home;

- An e-mail dated 28 August 2012 to Shukri Abd Hamid, one of the property managers, about the specific procedures that have been in place when workers were to attend at the matrimonial home;

- An e-mail dated 4 September 2012 to Sherene Low, one of the husband's private secretaries, to order food from Corus Hotel, Kuala Lumpur.

[60] In the months between January to September 2012 (prior to her remaining in England), the DW travelled with the PH on at least ten personal and work related trips from Kuala Lumpur to Singapore (three trips), Argentina, Brunei, Miri, Venice (two trips), Hong Kong (numerous trips), Perth (two trips), Kota Kinabalu and London (at least four trips).

[61] The DW has until recently, always sought all major healthcare and medical treatment either in Malaysia or Canada. In fact, even after choosing to remain in England, she emailed the PH's personal assistant in Malaysia to purchase medical and health products from her doctors in Kuala Lumpur to be sent to her in England. The PH has produced the DW's medical receipts for the years especially 2011 to 2012 which were always submitted by her to the PH's head office in Malaysia for payment, which show she sought medical care from the following medical personnel mainly in Malaysia and some in Canada (never England):

(i) ANOC Neuroscience & Orthopaedic Centre, Bukit Bandaraya;

(ii) Drs Tong, Leow, Chiam & Partners;

(iii) Menara Ambank, Kuala Lumpur;

(iv) HSC Medical Centre (KL) Sdn Bhd, Menara HSC, Jalan Ampang;

(v) Dr Chan Fook Kow, Gleneagles Hospital, Kuala Lumpur;

(vi) Klinik Pakar Pergigian Wong, Jalan Medan Tuanku, Kuala Lumpur;

(vii) Dr Vimalan Rathakrishnan, Pantai Medical Centre;

(viii) Lablink (M) Sdn Bhd Medical Laboratory, Jalan Pahang, Kuala Lumpur;

(ix) Gribbles Pathology (M) Sdn Bhd, Petaling Jaya, Malaysia;

(x) Synapse Rehab Consulting, Menara BRDB, Bukit Bandaraya, Kuala Lumpur;

(xi) Neurology & Neurophysiology Clinic, Gleneagles Singapore;

(xii) Dr Peter Yam, Evergreen Wellness, Blair Avenue, Canada;

(xiii) Shelbourne Physical Therapy, Victoria BC;

(xiv) South Optometry Centres, Canada.

[62] In December 2012 and January 2013 she continued to ask for medicines from Dr Chiam, her primary physician in Kuala Lumpur to be sent to her in England. She also asked for her organic green tea as well as for the old Dell battery for her computer left on her glass deck at the matrimonial home to be sent to her.

[63] The PH's work and vast business empire is based and centred in Malaysia, with the headquarters of Malayan United Industries Berhad ("MUI") of which the PH is currently Group Chairman and Chief Executive situated in Kuala Lumpur. He holds directorship positions in several listed companies that are all incorporated in Malaysia namely:

(a) Metrojaya Berhad;

(b) MUI Properties Berhad;

(c) Pan Malaysian Industries Bhd, an associate company of MUI;

(d) MUI Continental Insurance Bhd.

[64] While the PH has businesses overseas eg, Hong Kong and Singapore his business interests outside Malaysia are mostly related or linked to his business interests in Malaysia. All the companies

whether in Malaysia or outside Malaysia, lists his address as being in Malaysia, that is his residential address at the matrimonial home or the registered office address at 189 Jalan Ampang.

[65] It is MUI, the Malaysian company that acquired a substantial interest in Laura Ashley Holdings PLC ("Laura Ashley") in 1997. It was only then that the PH became Laura Ashley's non-executive chairman. He has also been the non-executive director of Corus Hotels PLC since 1999 and its non-executive chairman since 2002.

[66] The PH's primary bank accounts are with banks in Malaysia and his salary is paid into his bank accounts in Malaysia. His personal staff such as his personal assistants, his security team (who travel around with him), his company employees are all employed in Malaysia and paid in Malaysia in Malaysian Ringgit.

[67] The events, chronology and facts of the case point irrefutably to Malaysia as where the action has the most real and substantial connection especially in seeking financial provisions in respect of maintenance and property division where the DW will have to look to Malaysia where the bulk of the PH's assets, business interests, and bank accounts are situated.

[68] As the main issues between the court in divorce proceedings between the parties would primarily centre around the issues of maintenance and property division, the witnesses required to testify at the trial are in Malaysia including *inter alia*, the PH, the office staff, the company staff and the company secretary, the housekeeper, the security staff as well as their primary medical team. Further, the documents that will eventually be required to be produced at the divorce trial are kept and stored here in Malaysia, especially the financial and company documents.

[69] Miss YN Foo submitted that the DW, to support her maintenance claims must seek information from the PH's Malaysian office since all her claims in the past were submitted and paid out of the Malaysia office.

[70] By the DW's own account, even in respect of payment of utilities for the overseas properties eg, Perth, Australia, the bills, council rates, invoices for the property were all forwarded to the plaintiff husband's staff in Kuala Lumpur, to be paid by them. Please see para. 22 of the defendant wife's third affidavit (encl. 11).

[71] The DW herself had to write to the PH's staff in Kuala Lumpur to seek information on her air miles for her frequent flier programmes, the addresses of the properties in Perth, London and Kuala Lumpur and their postal/zip codes as well as the record of her club membership at the Royal Selangor Club.

[72] The MUI group of companies of which the PH is the chairman has its operational base in Malaysia. All correspondence and documents are centred in Malaysia. Any assessment of the PH's business interests and companies must be done in Malaysia and governed by the Malaysian law as they are primarily Malaysian companies.

[73] From the above it can be concluded Malaysia is irrefutably the most appropriate forum to hear the divorce and litigate the ancillary issues of maintenance and property division.

Citizenship Of DW

[74] In his submission, counsel for DW said that it is not in dispute that the DW had acquired Australian and Canadian citizenship. What is so obvious to the court is that she is not a citizen of the United Kingdom nor has it been proven that she is a permanent resident there. Counsel for the DW submitted the DW travels on her Australian passport. Because of her assertion that she automatically lose her Malaysian citizenship, counsel urged this court to take judicial notice that "as a matter of common parlance that we are not allowed to have dual citizenship as Malaysians". He further submitted that the DW had committed an act that entitles the Federal Government to revoke DW's citizenship *vide* art. 24 of the Federal Constitution. But counsel of DW wrote this in his written submission:

> Constitutionally, therefore, it is correct to say the Wife remains a Malaysian citizen.

[75] I need say no further. However for purposes of completeness, I reproduce arts. 23 and 24 of the Federal Constitution:

> Chapter 2 - Termination of Citizenship
>
> 23. Renunciation of citizenship
>
> 1) Any citizen of or over the age of twenty one years and of sound mind who is also or is about to become a citizen of another country may renounce his citizenship of

the Federation by declaration registered by the Federal Government, and shall thereupon cease to be a citizen.

2) ...

3) ...

24. Deprivation of citizenship on acquisition or exercise of foreign citizenship, etc.

1) If the Federal Government is satisfied that any citizen has acquired by registration, naturalization or other voluntary and formal act (other than marriage) the citizenship of any country outside the Federation, the Federal Government may by order deprive that person of his citizenship.

2) If the Federal Government is satisfied that any citizen has voluntarily claimed and exercised in any country outside the Federation any rights available to him under the law of that country, being rights accorded exclusively to its citizens, the Federal Government may by order deprive that person of his citizenship.

[76] From the affidavits filed and submission of DW's counsel, there is no evidence that the Federal Government had made any order to deprive DW of her citizenship. Citizenship is a very important and precious right of a person and not to be deprived of in a lackadaisical manner and this court will not make a finding as such. Moreover, art. 24 empower the Federal Government to do so.

[77] From the above, I am making a finding that this court has the jurisdiction to hear the matrimonial proceedings of the two parties. As l am able to come to a conclusion regarding encl. 6, I find there is no necessity to have full hearing with witnesses as argued by counsel for the DW.

[78] For the above reasons, I am dismissing the DW's application at encl. 6 with costs of RM30,000.

Enclosure 1

[79] I shall now deal with encl. 1. I am allowing the PH's application for the following reasons:

(1) Under the LRA, it is a mandatory requirement for parties to refer their matrimonial difficulties to a conciliatory body provided that this requirement shall not apply if the court

amongst others is satisfied that there are exceptional circumstances which make such reference impracticable. Reproduced is s. 106 (1) of the LRA:

> 106. Requirement of reference to conciliatory body before petition for divorce
>
> (1) No person shall petition for divorce, except under sections 51 and 52, unless he or she has first referred the matrimonial difficulty to a conciliatory body and that body has certified that it has failed to reconcile the parties:
>
> Provided that this requirement shall not apply in any case:
>
> (i) ...
>
> (ii) ...
>
> (iii) ...
>
> (iv) ...
>
> (v) ...
>
> (vi) where the Court is satisfied that there are exceptional circumstances which make reference to a conciliatory body impracticable.

[80] In the case of *C v. A* [1998] 4 CLJ 38, it was held that:

> 3) The marriage had broken down through 20 years of separation, and neither party had shown any desire towards the continuance of the union, and there were no infant children involved to motivate a desire for the continuance of the marriage. All these factors clearly showed exceptional circumstances falling within the said proviso.
>
> 4) The word impracticable in the said proviso means impractical. This connotes fruitlessness, a sense of futility, and performing an act in vain or where it is not practical or workable to perform such an act. This was precisely what the petitioner would be doing if he were to refer to a conciliatory body. Such a referral would be an exercise in futility performed solely for the purpose of obtaining a rubber stamp to a certificate showing the failure of the body to effect a reconciliation.

[81] In our case, parties had sought "counselling" to resolve their matrimonial problem. In his affidavit (encl. 2), PH averred:

> I further state that the Defendant and I have over the years made many attempts to resolve our matrimonial difficulties, including but not limited to the following:
>
> (a) As both the Defendant and I are Christians, we had about 15-20 years ago sought marriage counselling from a senior pastor in our local church in Malaysia.
>
> (b) About 8-10 years ago, we had again sought marriage counselling from a senior pastor and his wife in our church in Canada. This counselling was arranged by the Defendant as she was good friends with the senior pastor's wife.
>
> (c) About 3-4 years ago, we again sought counselling from the church, this time from a senior pastor in our Singapore church.
>
> (d) More recently, over the past 18 months, we have tried to resolve our matrimonial difficulties with the help of a mutual friend. We had about 6 meetings as a couple with our mutual friend acting as counsellor and mediator. In addition to those joint sessions, we would also meet separately with our mutual friend.

[82] And more recently, in his affidavit at encl. 13 he averred:

> (a) I am a devout Christian and I had, throughout my marriage, attempted to work through the differences the Defendant and I had. Hence the various attempts at marital counselling through our church in Malaysia, Calvary Church *via* Reverend Tan Sri Dr Guneratnam, in Canada through the Soul Sanctuary *via* Reverend Dr Gerry Michalski, in Singapore with the Grace Assembly of God *via* Reverend Dr David Lim, as well as through our mutual friend, Ms Kwa Kim Li.
>
> (b) Even as recent as February 2013, I had approached Ms Kwa to speak to the Defendant to suggest either reconciliation or an agreement to live apart. Ms Kwa, a mutual friend who had in the past also counselled us, is a Managing Partner at the law firm, Messrs Lee & Lee, Singapore and Director of Laura Ashley Holdings Plc.

A (c) Ms Kwa met the Defendant for lunch on 13/2/2013. At the time, Ms Kwa and I were in London for a Laura Ashley board meeting. I asked Ms Kwa to convey to the Defendant that if she wanted to reconcile, then perhaps she could meet me at the Corus Hotel, Hyde Park on the evening of 13/2/ 2013 so that we could pray together and hopefully move on together as a couple.

(d) After the meeting with the Defendant, Ms Kwa informed me that the Defendant did not wish to reconcile and had said that I should make the decision about what should happen next as the Defendant did not want to. In fact the Defendant had indicated to Ms Kwa that I should make the decision as to where she should live and I suggested she stay in either Malaysia or Singapore. I had even agreed to make the necessary arrangements once she let me know which she preferred. I had suggested Singapore as our son, Andrew was living there as were our 2 grandchildren.

(e) ... What was most shocking and surprising was that it (the wife's English petition) was filed the very next day, 14/2/ 2013 i.e. the day after meeting with Ms. Kwa.

[83] It is clear from the above, many attempts for reconciliation were made but failed because the very next day after the last attempt, the DW filed her divorce petition in the English Courts. Hence, I see no point in the parties attending a conciliatory body in Malaysia and even if they do, it would be in the words of RK Nathan J in the case of *C v. A* [1998] 4 CLJ 38 – "an exercise in futility performed for the sole purposes of obtaining a rubber stamp to a certificate showing the failure of the body to effect a reconciliation".

[84] The DW had filed a divorce petition in England on 14 February 2013, ie, the very next day after the reconciliation attempt by Ms Kwa. In her affidavit at encl. 7 she averred:

I filed a Petition for Divorce in England on 14th February 2013 through my solicitors in England, Messrs Vardags. A copy of the Petition is shown in the affidavit under reply and marked as Exhibit KKP-1.

"I thereafter obtained an Occupation Order and a Non Molestation Order under the Family Law Act 1996 ("the FLA") on an *ex parte* basis on 18th February 2013, copies of which are shown in Exhibit KKP2 to the affidavit under reply. The FLA Order gave me sole occupation of the main ten bedroom house on the family's estate and the former matrimonial home known

> as Rossway House. (KKP) has sole occupation of the five bedroom house which is also on the family's estate which is known as Old Rossway. (KKP) is also prevented from going within 50 metres of Rossway House or using its main driveway."

[85] It is clear that she had filed her first petition on 14 February 2013. Later she filed an amended petition. This is what she averred:

> Thereafter, an Amended Petition was served on the Plaintiff's English solicitors on or about 27th February 2013, a copy of which is enclosed marked as Exhbit PC4.

[86] From her actions, it is doubtful whether she would return to Malaysia to attend the conciliatory process. She had filed not one but two proceedings. This shows her determination in getting a divorce. Hence again, for both parties to attend the conciliation process in Malaysia would be an exercise in futility.

[87] In his affidavit at encl. 13, PH also averred the following:

> The Defendant has launched a media campaign in England with the intention of prejudicing and embarrassing me, and in an attempt to obtain an unfair advantage. The Defendant had even recently given an interview to the English newspapers, during which interview her English solicitors were present and had also commented. This campaign has had a detrimental impact on my business. The Defendant has been providing inaccurate and misleading assertions as regards my wealth, my treatment of her as well as the Defendant's residence status. Annexed hereto and marked as Exhibit "KKP16" is a copy of the letter my English solicitors had sent dated 6/8/2013 together with the response from the Defendant's English solicitors dated 9/8/2013 in this regard.

[88] Exhibit KKP16 is reproduced below:

> PAYNE HICKS BEACH
>
> | | |
> |---|---|
> | Your Ref: AV/CT/SC-Chai | 10 New Square,
Lincon's Inn, London |
> | Our Ref: FSS/FJB/BPS/AMD/4204-1 | OX Box 40 London,
Chancery Lane |
> | By Email only - | Tel:02074654300
Fax:0207454380 |
> | | 6 August 2013 |

Private & Confidential

Vardag Solicitors

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contact@vardags.com

WITHOUT PREJUDICE OR SUBMISSION TO THE JURISDICTION

Dear Sirs,

PCSP AND KKP

We attach:

- An email we received from David Leppard of the Sunday Times dated 2 August;
- A response sent on behalf of our media Partner (Sarah Webb) to David Leppard dated 2 August; and
- The article which appeared in the Sunday Times of 4 August.

It is clear that your firm orchestrated and was present at an interview with your client and The Sunday Times, with the sole aim of attempting to prejudice this case and fight it through media channels. This is inappropriate and unprofessional behaviour. Further the interview contains many disputed allegations.

The points made in Sarah Webb's email to the Sunday Times, stand. This will remain the position of this firm and our client.

Your client and your firm's behaviour will be brought to the attention of any English Judge this matter appears before (together with your earlier attempts to use the media in these proceedings).

Further should there be any consequential negative commercial impact on our client's various global businesses as a result of these and any other actions of your client and your firm – our client reserves his position to seek redress in the appropriate forum.

Yours faithfully

Payne Hicks Beach.

[89] Solicitors for the DW replied and is reproduced as follows:

VARDAGS

Payne Hicks Beach

10 New Square

Lincoln's Inn

London

WC2A 3QG

9 August 2013

Your ref: FSS/FJB/BPS/WJP/ 26267.150

By Post & Fax: 02074654380 Our Ref: AV/CT/GH-Chai

Second Letter

Dear Sirs

PCSP and KKP,

We refer to your letter of 6 August.

Miss Vardag did attend at home with our client so that she would not feel uncomfortable with the journalist and to ensure that no confidential information from the case was inadvertently released by her.

Both we and our client deny that the interview was given with the sole aim or indeed the aim at all of attempting to prejudice this case or fight it through the media. Our client was desirous of telling her own personal story as she is entitled to do. Miss Vardag's comment merely echoed what was already in the public domain by way of the press attendance at the last hearing and subsequent reports.

Yours faithfully

VARDAGS

[90] The two correspondences show that there was indeed an interview with The Sunday Times by the DW. What is most interesting is the fact that the DW's solicitors stated – "Our client

was desirous of telling her own personal story as she is entitled to do." Now that interview appeared in The Sunday Times of 2 August 2013. Bear in mind that by this time, the DW had filed a divorce petition and an amended divorce petition in England and the PH had filed an application for exemption from attending the conciliatory process (encl. 1) and yet an interview was held and published. To my mind, this is an act of determination by the DW to go ahead with the divorce and therefore irrespective of the process of reconciliation, she would go ahead with it. Therefore, I am of the opinion that subjecting both parties to process of reconciliation would be fruitless and an exercise in futility.

[91] For the above reasons, I allow PH's application at encl. 1 with no order as to costs.

[92] Before I end, I must thank all counsels appearing before me for work well researched which had helped me in coming to my decision.